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CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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BUTTE ENVIRONMENTAL COUNCIL,  
et al.,

NO. CIV. S-04-0096 WBS/KJM

Plaintiffs,

v.

MEMORANDUM AND ORDER

GALE NORTON, et al.,

Defendants.

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Plaintiffs brought this action alleging that defendants: (1) violated the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq. by excluding over one million acres from the final critical habitat designation for fifteen vernal pool species; (2) violated mandatory notice and comment requirements under the ESA and the APA in designating critical habitat for the fifteen vernal pool species; and (3) have engaged in an unlawful pattern, practice and policy by failing to properly consider economic impacts of critical habitat designation as required by the ESA.

1 Defendants, Secretary of the Interior Gale Norton and  
2 the United States Fish and Wildlife Service (collectively,  
3 "FWS"), and move for a voluntary partial remand of plaintiffs'  
4 first two claims. Plaintiffs move for summary judgment on their  
5 first two claims and request additional injunctive relief.

6 I. Factual and Procedural History

7 A. Litigation History

8 In September 1994, after environmental groups brought a  
9 lawsuit to force FWS to list four vernal pool crustacean species  
10 as endangered, Envtl. Def. Ctr. v. Babbitt, Civ. No. 94-788 (C.D.  
11 Cal. 1994), FWS listed the species, but determined that  
12 designation of a critical habitat for the species was "not  
13 prudent at this time." 59 Fed. Reg. 48136, 48151 (Sept. 19,  
14 1994).

15 As a result, in 1995, an industry group brought an  
16 action challenging FWS's failure to designate critical habitat  
17 for the four crustacean species. Building Indus. Ass'n of Super.  
18 Cal. v. Babbitt, 979 F. Supp. 893 (D.D.C. 1997). The court  
19 ordered FWS to designate critical habitat, but imposed no  
20 deadline for completion of the designation.

21 Three years later, in 2000, plaintiff Butte  
22 Environmental Counsel brought suit in this court seeking to  
23 compel FWS to designate critical habitat for the four crustacean  
24 species by a fixed date. Butte Env'tl. Council v. White, 145 F.  
25 Supp. 2d 1180 (E.D. Cal. 2001). This court ordered FWS to  
26 complete a final designation within six months, by August 15,  
27 2001. Id. at 1185.

28 On July 23, 2001, the parties stipulated to a one-year

1 extension, until August 15, 2002, for the final critical habitat  
2 designation for the four crustacean species. FWS agreed to also  
3 designate critical habitat for eleven additional vernal pool  
4 plant species by August 15, 2002. (No. Civ. S-00-0797, Dec. 9,  
5 2002 Consent Decree at 2). FWS did not comply with the August  
6 15, 2002 deadline. (Id.).

7           This court issued an order on September 25, 2002,  
8 requiring FWS to publish the final critical habitat designation  
9 for the fifteen vernal pool species by February 14, 2003. (No.  
10 Civ. S-00-0797, Sept. 25 2002 Order at 18). On December 9, 2002,  
11 the parties entered into a Consent Decree establishing July 15,  
12 2003 as the new deadline for completing the final critical  
13 habitat designation for the fifteen vernal pool species. (No.  
14 Civ. S-00-0797, Dec. 9, 2002 Consent Decree at 5).

15       B. Critical Habitat Designation

16           On September 24, 2002, FWS published its proposed  
17 critical habitat designation for the vernal pool species in the  
18 Federal Register. The proposal included 1,662,762 acres. 67  
19 Fed. Reg. 59884.

20           On November 21, 2002, FWS released the draft Economic  
21 Impact Analysis ("EIA") on the proposed designation, and stated  
22 that it would accept comments on both the draft EIA and the  
23 proposed critical habitat designation until December 23, 2002.  
24 67 Fed. Reg. 70201. On March 14, 2003, FWS provided a second  
25 public comment period on the draft EIA. 68 Fed. Reg. 12336.

26           On August 6, 2003, FWS published the final designation  
27 of critical habitat for the vernal pool species. The following  
28 were excluded from the final critical habitat designation: (1)

1 land in Butte, Madera, Merced, Sacramento, and Solano counties in  
2 California ("the five California counties"); (2) four areas with  
3 Habitat Conservation Plans ("HCP"), which afford special  
4 management considerations and protections to the vernal pool  
5 habitat; (3) Santa Rosa Plateau Ecological Reserve, a state,  
6 federal and local cooperatively managed reserve; (4) National  
7 Wildlife Refuge and National Fish Hatchery lands; (5) state  
8 managed ecological reserves and wildlife areas; (6) military  
9 lands; and (7) tribal lands. 68 Fed. Reg. 46684, 46753.

10 The final designation included an estimated 1,184,513 acres  
11 of land. Id. at 46684. However, the estimate did not reflect  
12 the exclusions of land in the five California counties from the  
13 final designation. Id. According to plaintiffs, in total, the  
14 FWS removed over one million acres that had been included in its  
15 2002 proposal from the final critical habitat designation.  
16 (Pls.' Mot. at 5).

17 Plaintiffs filed this action challenging the FWS's  
18 critical habitat designation in January 2004. The parties agree  
19 that remand to FWS for reconsideration of the exclusions from the  
20 August 2003 critical habitat designation for the fifteen vernal  
21 pool species is appropriate. The parties also agree that the  
22 scope of the remand is limited only to the exclusions from the  
23 final critical habitat designation promulgated in August 2003  
24 and vacatur of the currently designated critical habitat is not  
25 necessary.

26 But the parties disagree as to whether that remand  
27 should come as a result of the court's ruling on the merits of  
28 plaintiffs' motion for summary judgment on its first two claims

1 or a voluntary remand. Also, plaintiffs request additional  
2 relief, including directions to the FWS in reconsidering the  
3 exclusions. The parties disagree as to the appropriate deadline  
4 for the completion of the reconsideration.

5 I. Discussion

6 A. Applicable Law

7 The court must grant summary judgment to a moving party  
8 "if the pleadings, depositions, answers to interrogatories, and  
9 admissions on file, together with the affidavits, if any, show  
10 that there is no genuine issue as to any material fact and that  
11 the moving party is entitled to judgment as a matter of law."  
12 Fed. R. Civ. P. 56(c). The party adverse to a motion for summary  
13 judgment may not simply deny generally the pleadings of the  
14 movant; the adverse party must designate "specific facts showing  
15 that there is a genuine issue for trial." Fed. R. Civ. P. 56(e);  
16 Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Simply put, "a  
17 summary judgment motion cannot be defeated by relying solely on  
18 conclusory allegations unsupported by factual data." Taylor v.  
19 List, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party  
20 must show more than a mere "metaphysical doubt" as to the  
21 material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475  
22 U.S. 574, 587 (1986).

23 Under section 4(a) of the ESA, when the FWS lists a  
24 species, "to the maximum extent prudent and determinable," it  
25 must also designate a critical habitat for that species. 16  
26 U.S.C. § 1533(a)(3). "Critical habitat" refers to geographic  
27 areas that are "essential" for the conservation of the species.  
28 16 U.S.C. § 1532(5)(A). Pursuant to section 4(b)(2) of the ESA,

1 FWS must designate critical habitat based on "the best scientific  
2 data available and after taking into consideration the economic  
3 impact, and any other relevant impact, of specifying any  
4 particular area as critical habitat." 16 U.S.C. § 1533(b)(2).

5 The court must set aside the FWS's actions taken  
6 pursuant to the ESA if they are "arbitrary, capricious, an abuse  
7 of discretion, or otherwise not in accordance with law." 5  
8 U.S.C. § 706(2)(A). A decision is arbitrary and capricious if  
9 the agency "has relied on factors which Congress had not intended  
10 it to consider, entirely failed to consider an important aspect  
11 of the problem, offered an explanation for its decision that runs  
12 counter to the evidence before the agency, or is so implausible  
13 that it could not be ascribed to a difference in view or the  
14 product of agency expertise." O'Keeffe's, Inc. v. United States  
15 Consumer Prod. Safety Comm'n, 92 F.3d 940, 942 (9th Cir. 1996)  
16 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto.  
17 Ins. Co., 463 U.S. 29, 43 (1983)). The court must ask whether  
18 the agency considered "the relevant factors and articulated a  
19 rational connection between the facts found and the choice made."  
20 Natural Res. Def. Council v. United States Dep't of the Interior,  
21 113 F.3d 1121, 1124 (9th Cir. 1997). The task of the reviewing  
22 court is to apply the arbitrary and capricious standard of review  
23 to agency actions based on the administrative record presented by  
24 the agency to the court. See Citizens to Preserve Overton Park,  
25 401 U.S. 402, 419 (1971).

26 B. Voluntary Remand Versus Summary Judgment

27 The parties dispute whether remand for reconsideration  
28 of the exclusions from the critical habitat designation for the

1 fifteen vernal pool species should be voluntary, without judicial  
2 consideration of the merits of plaintiff's claims, or court-  
3 ordered after consideration of the merits. See Cent. Power &  
4 Light Co. v. United States, 634 F.2d 137, 145 (5th Cir. 1980)  
5 (distinguishing between voluntary and court-generated remand).

6 In Jumping Frog Research Inst. v. Babbitt, No. C 99-  
7 01461 WHA, 1999 WL 1244149 \*2 (N.D. Cal. Dec. 15, 1999), the  
8 court, choosing between the FWS's request for a voluntary remand  
9 on its determination not to designate critical habitat and the  
10 plaintiffs' request for summary judgment, denied the FWS's  
11 request, and ordered remand because six years had already passed  
12 since the FWS first declined to designate critical habitat, and  
13 the FWS previously had ample opportunity to reevaluate its  
14 decision of its own accord, but chose not to act. Id.

15 Similarly, in S. Appalachian Biodiversity Project v.  
16 United States Fish & Wildlife Service, 181 F. Supp. 2d 883, 885-  
17 86 (E.D. Tenn. 2001), the plaintiff challenged the FWS's  
18 determination that critical habitat designation for certain  
19 species would not be prudent. Although the FWS acknowledged that  
20 "plaintiff's complaint is well-taken" and requested a voluntary  
21 remand, the court granted the plaintiff summary judgment on its  
22 claims because "it is conceivable, even probable," that without a  
23 court order and judicial deadline, "the [FWS] will assign those  
24 species the lowest priority in terms of urgency regarding the  
25 designation of critical habitat." Id.

26 Although, litigation regarding the vernal pool species  
27 has spanned more than a decade, and this court first ordered the  
28 FWS to designate critical habitat more than three years ago, in

1 2001, the concern articulated in S. Appalachian and implied in  
2 Jumping Frog -- that without a court order the FWS is less likely  
3 to make reconsideration a priority -- is tempered here by the  
4 agreement by the parties that the court's order should set a  
5 deadline for FWS's reconsideration, regardless of whether it is  
6 voluntary or court-ordered.

7           Moreover, in moving for summary judgment on their first  
8 two claims, plaintiffs specifically note that they "do not  
9 address the merits of these two claims." (Pls.' Mot. at 8, n.5).  
10 Rather, plaintiffs argue that they are entitled to summary  
11 judgment based on what they perceive to be the FWS's concession  
12 that the exclusions were illegal. See S. Appalachian, 181 F.  
13 Supp. 2d at 885-86 (granting summary judgment to the plaintiff  
14 based on the defendants' concession).

15           In the previous incarnation of this action, this court  
16 granted summary judgment to the plaintiff on its claim that the  
17 FWS violated the ESA by failing to designate critical habitat  
18 after the FWS agreed to a voluntary remand to reconsider its  
19 determination that a critical habitat designation was "not  
20 prudent." The FWS stated that "setting aside the not prudent  
21 determination . . . is consistent with the intent and purpose of  
22 that [voluntary] remand;" this court read the statement to be an  
23 absence of opposition by the FWS. Butte Envtl. Council, 145 F.  
24 Supp. 2d at 1183-84. However, here, the FWS explicitly states  
25 that it does not concede either the first or second claims and  
26 contests the merits of these claims. (See Reply at 3).

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1           1.   Plaintiffs' First Claim

2           First, plaintiffs allege that the FWS violated the ESA  
3 and APA by excluding over one million acres from the final  
4 critical habitat designation. The FWS states that  
5 reconsideration of the exclusions is appropriate because "upon  
6 review of the administrative record in this case, the FWS  
7 believes that the designation of critical habitat for the 15  
8 vernal pool species requires further analysis and explanation to  
9 ensure compliance with the [ESA] and the [APA] . . . ." (Defs.  
10 Mot. at 2) and that "[i]n this case, [the FWS] did not  
11 sufficiently memorialize its determination that the benefits of  
12 excluding certain areas from the 15 vernal pool species critical  
13 habitat designation outweighed the benefit of including them."  
14 (Id. at 6). Although these statements may be consistent with a  
15 determination that the record would not demonstrate that the FWS  
16 considered "the relevant factors and articulated a rational  
17 connection between the facts found and the choice made," Natural  
18 Res. Def. Council, 113 F.3d at 1124, they are not the equivalent  
19 of a concession that a violation of either the ESA or APA will be  
20 found.

21           2.   Plaintiffs' Second Claim

22           Plaintiffs' second claim alleges that the FWS failed to  
23 meet mandatory notice and comment requirements in making the  
24 final critical habitat designation. The FWS states that "at a  
25 minimum, it is appropriate to reopen the comment period,"  
26 suggesting that the FWS previously provided for public notice and  
27 comment. (Defs.' Mot. at 6). Indeed the Federal Register  
28 indicates that on November 21, 2002, after releasing its draft

1 economic analysis, the FWS requested comment on both the draft  
2 EIA and the proposed critical habitat designation. 67 Fed. Reg.  
3 70201; 68 Fed. Reg. 12336.

4 Moreover, plaintiffs' own statements indicate that they  
5 have not read the FWS's statements as a concession that it failed  
6 to comply with public notice and comment requirements. In urging  
7 the court to provide instructions regarding the FWS's  
8 reconsideration, plaintiffs state that the "FWS does not commit  
9 to providing public notice and comment for all 4(b)(2)  
10 exclusions" (Pls.' Cross Mot. for Summ. J. at 11), suggesting  
11 that the FWS has not agreed with plaintiffs' interpretation of  
12 the required notice and comment.

13 As the FWS has not conceded plaintiffs' first two  
14 claims, and plaintiffs have not argued these claims on the  
15 merits, the court will deny plaintiffs' motion for summary  
16 judgment on the first two claims.

17 C. Directions for Reconsideration

18 Plaintiffs request that the court order the FWS to  
19 comply with the following directions during the remand  
20 proceedings:

- 21 (1) in complying with the ESA section 4(b)(2) duty  
22 to "consider" economic impacts, FWS quantifies the  
23 economic benefits of designating critical habitat  
24 in the five California counties that were illegally  
25 excluded in the Final Designation;
- 26 (2) in complying with its ESA section 4(b)(2) duty  
27 to balance the benefits of designating versus not  
28 designating, FWS considers and evaluates the  
29 recovery benefits of designating the illegally  
30 excluded one million acres;
- 31 (3) FWS provides public notice and comment on any  
32 exclusions of critical habitat lands based on ESA  
33 section 4(b)(2).

34 (Pls.' Mot. at 1).

1 Plaintiffs argue that these directions are necessary  
2 because the long history of efforts, beginning in 1994, to force  
3 the FWS to designate critical habitat for the fifteen vernal pool  
4 species demonstrates that the FWS will not comply with  
5 requirements under the ESA and APA in reconsidering the  
6 exclusions.

7 However, by these directions, it appears that  
8 plaintiffs are attempting to secure everything they seek in their  
9 complaint while circumventing the need to argue the merits of  
10 their claims. Plaintiffs moved for summary judgment on two of  
11 their claims related to the FWS's August 2003 critical habitat  
12 designation, but have not discussed the merits of those claims.  
13 Plaintiffs have not addressed or even sought summary judgment on  
14 their third claim, alleging that the FWS has a practice of  
15 failing to properly consider economic impacts of critical habitat  
16 designation as required by the ESA; this claim seems related to  
17 two of the above-listed directions relating to the evaluation of  
18 impacts. Thus, these motions have not provided the court  
19 sufficient information establishing what flaws existed in the  
20 analysis or procedures used in the final designation, and if  
21 those flaws relate to the directions now requested.

22 For the court to opine on what steps the agency must  
23 now take to properly analyze the critical habitat designation for  
24 the exclusions on remand would be imprudent and premature. See  
25 Building Indus. Legal Def. Found. v. Norton, 231 F. Supp. 2d 100,  
26 104 (9th Cir. 2002) (ruling partially on the merits after the  
27 FWS's concession that the economic analyses in its critical  
28 habitat designation were defective, but declining to instruct the

1 FWS on what to assess on remand because it had no information  
2 about what the flaw in the analysis was). These decisions are  
3 best addressed in the first instance by the agency itself. See  
4 id. With this concern in mind, the court now addresses each of  
5 the proposed conditions individually.

6 1. Quantification of Economic Benefits

7 Pursuant to the ESA, the FWS shall "tak[e] into  
8 consideration the economic impact . . . of specifying any  
9 particular area as critical habitat." 16 U.S.C. § 1533(b)(2).  
10 In the court's order of June 2, 2004, the court noted that "it  
11 stands to reason that in order to consider the economic impact,  
12 defendants must consider both the positive and negative impact."  
13 (June 2, 2004 Order at 7). However, in that order, the court did  
14 not address whether those positive impacts need to be quantified  
15 by the FWS. Plaintiffs have not cited, and the court is unaware  
16 of any case in which the court has instructed FWS on how to  
17 consider the impacts by ordering the FWS to specifically quantify  
18 the economic benefits of designation.

19 2. Consideration of Recovery Benefits

20 The FWS "may exclude any area from critical habitat"  
21 upon finding "that the benefits of such exclusion outweigh the  
22 benefits of specifying such area as part of the critical  
23 habitat." 16 U.S.C. § 1533(b)(2). Plaintiffs argue that a  
24 recent Ninth Circuit decision, Gifford Pinchot Task Force v.  
25 United States Fish & Wildlife Serv., 378 F.3d 1059 (9th Cir.  
26 2004), requires that in conducting the required balancing of  
27 benefits to determine whether exclusion is proper, the FWS must  
28 consider if designation will aid in the recovery of listed

1 species.

2 In Gifford Pinchot, the Ninth Circuit interpreted  
3 "critical habitat" as including both areas essential for the  
4 survival of and areas essential for the recovery of the listed  
5 species. Gifford Pinchot, 378 F.3d at 1069-70 (interpreting what  
6 considerations must be taken into account by the FWS in  
7 determining, for the purposes of consultations required by  
8 section 7 of the ESA, whether "destruction or adverse  
9 modification" to critical habitat is threatened) (citing with  
10 approval Sierra Club v. United States Fish & Wildlife Serv., 245  
11 F.3d 434, 438 (5th Cir. 2001)).

12 The FWS agrees that the Ninth Circuit's Gifford Pinchot  
13 decision "raises significant questions about the assumptions [the  
14 FWS] used in conducting its original economic analysis," and  
15 indicates that "[a] new economic analysis would allow [it] to  
16 take this decision into consideration in reevaluating the  
17 economic impacts of the designation." (Manson Decl. ¶ 6).

18 Because the parties have not established the specific  
19 flaws, if any, in the FWS's prior analysis, and because the FWS  
20 has not yet had the opportunity to reassess its designation in  
21 the wake of Gifford, the court determines that it would be more  
22 prudent to allow the FWS to address the implications of Gifford  
23 first, rather than hypothesize what new steps the FWS should take  
24 in preparing its economic analysis and its consideration of  
25 "economic impact, and any other impact" in light of Gifford. See  
26 Building Indus., 231 F. Supp. 2d at 104 (declining to instruct  
27 FWS as to what methodology it must use in preparing its economic  
28 analysis on remand in reconsidering its designation in light of

1 the Tenth Circuit's New Mexico Cattle Growers decision even  
2 though the parties agreed that the FWS's designation was improper  
3 under the Tenth Circuit's decision).

4 3. Public Notice and Comment

5 The ESA requires FWS to provide public notice and  
6 invite comment on a proposed critical habitat designation. 16  
7 U.S.C. § 1533(b)(5)(A). Plaintiffs assert that the exclusions at  
8 issue were a significant change in the final rule for which the  
9 FWS did not provide public notice and comment, and was  
10 inconsistent with its statement that "prior to excluding these  
11 areas from critical habitat, we [the FWS] believe that it is best  
12 to fully and specifically describe the areas in the proposed  
13 designation, discuss our intent and rationale as to why we  
14 believe the areas should be excluded from designated critical  
15 habitat, and solicit public comment on the exclusion of these  
16 areas." 67 Fed. Reg. 59966.

17 "Yet the fact that a final rule varies from a proposal,  
18 even substantially, does not automatically void the  
19 regulation[]." Rybachek v. EPA, 904 F.2d 1276, 1287-88 (9th Cir.  
20 1990). Rather, the court must determine whether the exclusion  
21 from the final rule "was in character with the original proposal  
22 and a logical outgrowth of the notice and comments received."  
23 Id. at 1288. Here, the parties have not discussed the merits of  
24 whether the FWS failed to provide adequate public notice and  
25 comment; they have not discussed whether the exclusions were a  
26 logical outgrowth of the notice and comments received. Moreover,  
27 because this is a reconsideration of solely the exclusions, the  
28 universe of possible exclusions from designation is known. Also,

1 FWS has already stated that it will "reopen the comment period on  
2 the designation with respect to the areas excluded," (Manson  
3 Decl. ¶ 20), admitting that "at a minimum, it is appropriate to  
4 reopen the comment period, reanalyze all of the areas excluded  
5 pursuant to § 4(b)(2), and make a new determination. . . ." (*Id.*  
6 ¶ 4). Accordingly, the court need not instruct FWS to provide  
7 public notice and comment upon remand.

8 D. Treatment as Critical Habitat

9 Pending completion of the final designation, plaintiffs  
10 request that the court require the FWS to treat the excluded land  
11 as designated critical habitat during consultations required by  
12 section 7 of the ESA.

13 The party moving for an injunction must demonstrate  
14 that: (1) legal remedies are inadequate; and (2) injunctive  
15 relief is necessary to prevent substantial and immediate  
16 irreparable injury. See Easyriders Freedom F.I.G.H.T. v.  
17 Hannigan, 92 F.3d 1486, 1495 (9th Cir. 1996); Cal. Trout v.  
18 Norton, No. C 97-3779 SI, 2003 WL 23413688, \*5 (N.D. Cal. Feb.  
19 26, 2003).

20 Pursuant to section 7(a)(2) of the ESA, designation as  
21 critical habitat triggers a consultation requirement intended to  
22 ensure that federal agency actions do not (1) jeopardize the  
23 continued existence of an endangered species or (2) destroy or  
24 adversely modify designated critical habitat. 16 U.S.C. §  
25 1536(a)(2), (3). To comply with section 7 of the ESA, federal  
26 agencies must consult with the FWS for actions that "may impact"  
27 a listed species or designated critical habitat. *Id.* Formal  
28 consultation is not required if the FWS issues a "written

1 concurrence" concluding that the agency's proposed action "is not  
2 likely to adversely affect the listed species or critical  
3 habitat." 50 C.F.R. § 402.14(a),(b). If formal consultation is  
4 necessary, FWS provides a "biological opinion" as to whether  
5 jeopardy to the species or adverse modification of the critical  
6 habitat is likely to occur. 16 U.S.C. § 1536(b)(3)(A).

7           Although plaintiffs request that the court order FWS to  
8 treat all the excluded lands as critical habitat, they only offer  
9 evidence pertaining to harm to the excluded land in the five  
10 California counties. Plaintiffs present evidence that since the  
11 final designation in August 2003, in performing its section 7  
12 consultations under the ESA, the FWS has approved 26 federal  
13 agency projects on the excluded land in the five California  
14 counties without determining whether those projects would destroy  
15 or adversely modify the habitat. (Echt Decl. ¶ 4). Also,  
16 plaintiffs point to selections from the administrative record  
17 indicating that two of the protected vernal pool plants, the  
18 Sacramento Orcutt grass and the Butte County meadowfoam, only  
19 exist in the excluded California counties; this suggests that  
20 while the reconsideration is pending, no critical habitat for  
21 these species is receiving the full protection of section 7 of  
22 the ESA. (Administrative Record ("AR") 8011529).

23           However, plaintiffs do not dispute that section 7  
24 consultations would be completed even in the absence of  
25 designation, because the presence of the species in the excluded  
26 areas would have triggered a concern over jeopardy of their  
27 continued existence. Thus, the injunction plaintiffs request  
28 would only require the FWS to assess the added consideration of



1 whether adverse modification of the critical habitat is likely to  
2 occur. See Building Indus., 231 F. Supp. 2d at 105 (determining  
3 that vacating the existing critical habitat designations during  
4 remand was unlikely to impact the outcome of section 7  
5 consultations due to the presence of the species in all the  
6 disputed areas); but see Natural Res. Def. Council v. Dep't of  
7 the Interior, 275 F. Supp. 2d 1136, 1148 (C.D. Cal. 2002)  
8 ("adverse modification" has a broader scope and application than  
9 the "jeopardy" limitation in section 7 of the ESA). Also,  
10 section 7 of the ESA requires federal agencies to confer with FWS  
11 on any agency action likely to result in the "destruction or  
12 adverse modification of critical habitat proposed to be  
13 designated." 16 U.S.C. § 1536(a)(4). Thus, the exclusions at  
14 issue will also receive this lesser protection under the ESA.

15           Plaintiffs argue that "while the [FWS's] Biological  
16 Opinion theoretically serves an 'advisory function,' in reality  
17 it has a powerful coercive effect on the action agency." Bennett  
18 v. Spear, 520 U.S. 154, 169 (1997) (internal citation omitted).  
19 However, this argument does not contradict the fact that the  
20 federal agency, having consulted with FWS, is not bound by the  
21 findings of the biological opinion or its final conclusion as it  
22 pertains to the proposed action. Tribal Village of Akutan v.  
23 Hodel, 869 F.2d 1185, 1193 (9th Cir. 1988); Middle Rio Grande  
24 Conservancy Dist. v. Babbitt, 206 F. Supp. 2d 1156, 1171 (D.N.M.  
25 2000) (citing Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th  
26 Cir. 1976)). In Bennett, the Court explained that a federal  
27 agency could choose to deviate from FWS's recommendations, but  
28 "bears the burden of 'articulat[ing] in its administrative record

1 its reasons for disagreeing with the conclusions of a biological  
2 opinion'" and runs a "substantial risk" if it is wrong. Bennett,  
3 520 U.S. at 169-70 (citation omitted).

4 Thus, because section 7 consultations produce mere  
5 opinions without force of law, it is hard to see how failure to  
6 consider the added criterion of whether the agency's proposed  
7 action threatens to destroy or adversely modify designated  
8 critical habitat, will cause irreparable harm. Even if the FWS  
9 issued only unfavorable reviews of every proposed project, the  
10 agencies seeking consultation would be free to ignore the opinion  
11 and continue with their projects. See Middle Rio Grande  
12 Conservancy Dist. v. Babbitt, 206 F. Supp. 2d at 1171-72; but see  
13 Defenders of Wildlife v. Norton, 239 F. Supp. 2d 9, 25 (D.D.C.  
14 2002) (enjoining FWS from completing any biological opinion or  
15 written concurrence for an action that "may affect" the relevant  
16 endangered species until the final critical habitat rule is in  
17 place; the injunction was later lifted by agreement of the  
18 parties); Cal. Trout, 2003 WL 23413688 at \*5 (same).

19 Despite plaintiffs' argument to the contrary, the  
20 requested injunction, requiring the FWS to treat land as critical  
21 habitat pending reconsideration, would from the court's  
22 standpoint actually be more drastic than a prohibitive injunction  
23 preventing the FWS from completing a section 7 consultation in  
24 that it requires affirmative conduct by the FWS, and would place  
25 the court in the position of micro-managing the affairs of the  
26 FWS. See Dahl v. HEM Pharmaceuticals Corp., 7 F.3d 1399, 1403  
27 (9th Cir. 1993) (injunction requiring affirmative conduct by a  
28 party is subject to heightened scrutiny). Although the court has

1 broad discretion to fashion a remedy to protect the status quo, a  
2 remedy such as requested is not necessitated here; the procedures  
3 already in place under the ESA provide sufficient protection.

4 Thus, the court is unpersuaded that forcing the FWS to  
5 consider the excluded land as critical habitat during section 7  
6 consultations will have the effect of blocking projects that  
7 threaten environmental harm. Accordingly, the court will not  
8 require defendants to treat the excluded land as critical habitat  
9 for the purposes of section 7 consultations.

10 E. Deadline for Designation

11 In setting a timetable for agency action, the Ninth  
12 Circuit has instructed courts to follow a standard of  
13 reasonableness. See Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867,  
14 872 (9th Cir. 1995).

15 1. FWS's Proposal

16 The FWS claims that it will take eighteen months, or  
17 until March 31, 2006, to complete the designation upon remand if  
18 the reconsideration involves preparation of a new economic  
19 analysis. Alternatively, without preparation of a new economic  
20 analysis, FWS estimates that the designation will take six months  
21 to complete.

22 Craig Manson, Assistant Secretary of Fish and Wildlife  
23 and Parks at the United States Department of the Interior,  
24 believes that sufficient resources for the remand will be  
25 available by Fiscal Year ("FY") 2005, which began October 1,  
26 2004. (Manson Decl. ¶¶ 8-14). According to Manson, the first  
27 stage of the remand will involve assisting economic contractors  
28 with the review, revision, and updating of the draft economic

1 analysis. (Id. ¶ 16). However, because the FWS is currently  
2 soliciting proposals for a new contractor to conduct its economic  
3 analyses, Manson estimates that it will not be able to begin work  
4 on the economic analysis for at least 120 days. Once the draft  
5 economic analysis is completed and reviewed by the FWS, the FWS  
6 requires a period of at least 30 days for public comment. (Id.).  
7 Following this 30 day period, the FWS must then compile and  
8 analyze all comments received. Finally, after the FWS completes  
9 a draft final rule, the rule must undergo a review process that  
10 includes review at the FWS Field, Regional, and National Offices,  
11 as well as the Office of Management and Budget ("OMB"). (Id. ¶¶  
12 21-23).

13           Alternatively, without a new economic analysis, FWS  
14 estimates that the review could be completed in six months, after  
15 reopening of the comment period, the FWS's review and analysis of  
16 the comments received, and review by the Field, Regional, and  
17 National Offices, and the OMB.

18           The FWS's estimates are based on its budgetary and  
19 workload constraints resulting from the 32 critical habitat  
20 designations it must fund in FY 2005 pursuant to court orders and  
21 settlement agreements, and the five designations currently in  
22 litigation that could potentially require designations in FY  
23 2005. (Manson Decl. ¶¶ 12-13). The Sacramento Field Office is  
24 the lead office for the designation at issue here, but is also  
25 responsible for other court-ordered critical habitat designations  
26 with the following FY 2005 deadlines: December 1, 2004, January  
27 12, 2005, June 1, 2005, September 20, 2005, October 1, 2005, and  
28 November 30, 2005. Manson adds that in his experience, other

1 unanticipated factors will likely require commitment of  
2 additional funding or resources. (Id. ¶ 14). Finally, the FWS  
3 points out that the previous deadlines set by the court, all  
4 shorter than the FWS's proposals, did not provide sufficient  
5 time, culminating in the current reconsideration.

6           2. Plaintiffs' Proposal

7           Plaintiffs request that the court order the FWS to  
8 finalize its critical habitat designation on all excluded lands  
9 other than the five California counties within 60 days.  
10 According to plaintiffs, a new economic analysis is necessary  
11 only for the five California counties because these were the only  
12 exclusions based on economic reasons.<sup>1</sup> "As a result, FWS must  
13 simply finalize the designation of these essential habitat areas  
14 or, if appropriate, allow for public notice and comment on any  
15 proposed 4(b)(2) exclusions." (Pls.' Mot. at 13). Plaintiffs  
16 argue that reconsideration of the exclusion of land in the five  
17 California counties, even with preparation of a new economic  
18 analysis, can be completed within six months.

19           According to plaintiffs, the long history of this case  
20

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21           <sup>1</sup> According the proposed rule, "the total costs that may  
22 be attributable . . . resulting from the listing of the 15 vernal  
23 pool species and the critical habitat designation could be about  
24 \$1.3 billion over the next 20 years. . . . Several counties  
[Butte, Madera, Merced, Solano, and Sacramento] have been  
excluded from this rule because of the high economic impacts  
found by our economic analysis." 68 Fed. Reg. at 46753-54.

25           In conducting the economic analysis, the FWS made a  
26 "computational error in the calculation of the annual economic  
cost of [critical habitat] designation as a percentage of each  
[California] county's total taxable sales for the year 2000."  
27 (AR 8011687). "As a result [of the error], the annual cost of  
[designation] as a percentage of the county's total taxable sales  
28 for 2000 should have been 0.1568% instead of the 156.8% contained  
in the . . . analysis." (Id.).

1 makes the proposed March 2006 deadline unreasonable; the four  
2 vernal pool crustaceans were first listed as endangered in 1994.  
3 The ESA requires concurrent designation of critical habitat, "to  
4 the maximum extent prudent and determinable," when a species is  
5 listed as endangered. See 16 U.S.C. § 1533(a)(3)(A). Plaintiffs  
6 add that the scope of the "new" economic analysis is narrow  
7 because it is limited to the excluded land in the five California  
8 counties and because the FWS has already quantified the economic  
9 costs of a critical habitat designation in the prior analysis,  
10 and now need only quantify the economic benefits.

11           3. Court's Timeline

12           Having considered these alternatives, the court finds a  
13 reasonable deadline lies somewhere between the parties'  
14 proposals. Although the court is mindful of the FWS's limited  
15 resources and need to complete other ESA functions, "[t]o the  
16 extent the [agency] feels aggrieved by Congress' failure to  
17 allocate proper resources in which to comply with [its] statutory  
18 duty, Congress, not the courts, is the proper governmental body  
19 to provide . . . relief." Conservation Council for Hawaii v.  
20 Babbitt, 24 F. Supp. 2d 1074, 1079-80 (D. Haw. 1998) (quoting  
21 Southwest Ctr. for Biological Diversity v. Babbitt, No. 96-1874,  
22 slip op. at 7 (D. Ariz. March 20, 1997)). The FWS cannot avoid  
23 its mandatory duties under the ESA "on the grounds that the  
24 budget and staff" are inadequate. Center for Biological  
25 Diversity v. Norton, 304 F. Supp. 2d 1174, 1180 (D. Ariz. 2003).

26           Also, the court cannot ignore the substantial time that  
27 has been spent to compel the FWS to properly perform its duties  
28 under the ESA. Not only were the four vernal pool species

1 listed, as a result of litigation, more than nine years before  
2 the FWS finally issued, by this court's order, a critical habitat  
3 designation in August 2003, but the August 2003 designation came  
4 two years after this court's initial deadline of August 2001.  
5 This court initially provided the FWS six months to complete its  
6 entire critical habitat designation. Now, the FWS need only  
7 reconsider the exclusions.

8           The FWS took two years to complete its economic  
9 analysis for 39 counties, and now need only prepare a new  
10 economic analysis for five counties. See 67 Fed. Reg. 59966.  
11 It is reasonable to assume the FWS's earlier work will expedite  
12 its reconsideration, especially given that the FWS was given two  
13 years to complete its prior analysis, and that it received its  
14 second deadline extension "to attempt to ensure that the Final  
15 Rule designating critical habitat for the 15 vernal pool species  
16 is biologically accurate and complete, and legally valid." (No.  
17 Civ. S-00-0797, Dec. 9, 2002 Consent Decree at 5).

18           Also, the start of the FWS's FY 2005 has already begun,  
19 and more than one month has passed since the filing of Manson's  
20 declaration indicating that the FWS was in the process of  
21 searching for a contractor to perform its economic analyses and  
22 estimating 120 days for that process. Accordingly, the court  
23 will grant the FWS until July 31, 2005 to complete its final  
24 designation for the land excluded in the five California  
25 counties.

26           It appears that to properly complete its  
27 reconsideration of the excluded land, with the exception of the  
28 land in the five California counties, only public notice and

1 comment, and the FWS's review of those comments is necessary.  
2 Under the ESA's implementing regulations, following publication  
3 of a proposed critical habitat designation or revision, the FWS  
4 must provide at least 60 days for public comment. 50 C.F.R. §  
5 424.16(c)(2).<sup>2</sup> Accordingly, the court will grant the FWS 120 days  
6 to complete this final designation for the exclusions other than  
7 those in the five California counties.<sup>3</sup>

8 IT IS THEREFORE ORDERED that:

9 (1) the FWS's motion for voluntary partial remand be, and  
10 the same hereby is, GRANTED;

11 (2) plaintiffs' motion for summary judgment as to their  
12 first and second claims be, and the same hereby is, DENIED;

13 (3) plaintiffs' request for additional relief, in the form  
14 of directions regarding the FWS's reconsideration be, and the  
15 same hereby is, DENIED;

16 (4) plaintiffs' request for an injunction requiring the FWS  
17 to treat the excluded lands as critical habitat pending its  
18

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19 <sup>2</sup> Pursuant to 50 C.F.R. § 424.16(c)(2), "[a]t least 60  
20 days shall be allowed for public comment following publication in  
21 the Federal Register of a rule proposing . . . the designation or  
22 revision of critical habitat. All other proposed rules shall be  
subject to a comment period of at least 30 days following  
publication in the Federal Register."

23 <sup>3</sup> In a footnote to its motion, the FWS asserts that the  
24 remand will "directly address and render moot" plaintiffs' first  
25 two claims. Also, the FWS asserts that because the first two  
26 claims will be rendered moot, dismissal of plaintiffs' third  
claim alleging that the FWS has an unlawful pattern, practice, or  
policy will be warranted because it will no longer be tethered  
to an alleged specific application that resulted in violation of  
the ESA and APA.

27 However, because the parties have not briefed the issue  
28 or requested dismissal, in this order, the court does not address  
the status of plaintiffs' claims as a result of the remand in  
this order.



15:02 OCT 29, 2004

1 reconsideration be, and the same hereby is, DENIED;

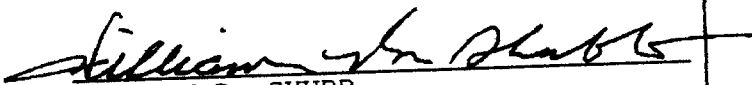
2 (5) the FWS's August 2003 final critical habitat designation  
3 for the fifteen vernal pool species is NOT VACATED;

4 (6) the exclusions from the final critical habitat  
5 designation are REMANDED to the FWS for reconsideration;

6 (7) FWS shall publish in the Federal Register the final  
7 critical habitat designation regarding the currently excluded  
8 land, with the exception of the land in the five California  
9 counties within 120 days from the date of this order; and

10 (8) FWS shall publish in the Federal Register the final  
11 critical habitat designation regarding the currently excluded  
12 land in the five California counties by no later than July 31,  
13 2005.

14 DATED: October 28, 2004

  
WILLIAM B. SHUBB  
UNITED STATES DISTRICT JUDGE